No. 231

IN THE

Supreme Court of the United States

October Term, 1957

SALVATORE BENANTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The nature of the Government's opposition to review in this case suggests that an elaboration of petitioner's position may be of assistance to the Court.

I

To begin with, there is a plain conflict between the ruling below, now reported at 244 F. 2d 389, and the decisions of the Tenth Circuit in *Rathbun* v. *United States*, 236 F. 2d

514, certiorari granted, 352 U. S. 965 (No. 30, this Term), and of the Seventh Circuit in *United States* v. *White*, 228 F. 2d 832, and *United States* v. *Bookie*, 229 F. 2d 130.

In all four cases, state officers alone listened to the conversations in question. In the three cases cited, it is true, the precise issue was whether listening in on an extension telephone amounted to a violation of §605 of the Communications Act. If, as the court below held in the present case, an undoubted interception by state officers is admissible in a federal prosecution, then it would not have been necessary to consider whether the conduct involved in *Rathbun*, *White*, and *Bookie* constituted an interception; each case could have been disposed of on the assumption that it did, and thus the troublesome question of the precise limits of a forbidden interception could have been avoided. Compare *Goldman* v. *United States*, 316 U. S. 129 (detectaphone); *On Lee* v. *United States*, 343 U. S. 747 (walkie-talkie); *Sugden* v. *United States*, 226 F. 2d 281 (C. A. 9), affirmed *per curiam*, 351 U. S. 916 (FCC monitoring). Far from not reaching the question decided below in this case, the other circuits necessarily decided it, and decided it differently than did the court below.

There is, accordingly, an inescapable and essential conflict between the rationale of the present case and that of the three others—a conflict that does not disappear simply because the Government chooses to relegate its discussion thereof to a footnote (Br. Op. 10, n. 2). Difficult legal issues do not yield to such sweeping-under-the-rug technique.

II

The Government asserts (Br. Op. 7) that "Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps." But actually, the issue whether evidence illegally obtained because of wiretapping in violation of Communications Act §605 is admissible in a federal prosecution poses a question wholly different from the inquiry whether evidence that is illegally obtained because of an unreasonable search and seizure is similarly admissible.

To begin with, the Fourth Amendment, which alone is the basis for excluding from use in a federal prosecution evidence obtained as the fruit of an unreasonable search and seizure (*Weeks* v. *United States*, 232 U. S. 383), does not apply to the States. That the first eight amendments limit only the federal Government was first decided in *Barron* v. *Baltimore*, 7 Pet. 243. Repeated attempts to make the provisions of those amendments bind the States, on the theory that they are included in their entirety in the Fourteenth Amendment, have been rejected over the years (*Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319), the last rejection being fairly recent (*Adamson* v. *California*, 332 U. S. 46).

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

But this is far from saying either that the Fourth Amendment binds the States or that it is fully incorporated into the Fourteenth. To the contrary, as *Irvine* v. *California*, 347 U. S. 128 shortly thereafter demonstrated, the Fourteenth Amendment's protection against unreasonable searches and seizures on the part of state officers is markedly narrower than the Fourth's against similar conduct by federal officials. Plainly a federal conviction tainted as Irvine's was would not have passed constitutional scrutiny. Cf. *Kremen* v. *United States*, 353 U. S. 346.

Here, however, there is involved a statute of general application, whose meaning has become settled, not through the gradual process of inclusion or exclusion, but by a consideration of the plain meaning of its terms. The net of the decisions is simply this, that when Congress in §605 said "no person", it meant "no person". *Pardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321. Consequently, the question is not whether, as an original proposition, a violation of a statute is to be more sweepingly condemned than a violation of the Constitution (L. Hand, *J.*, in *United States* v. *Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114), it is rather whether the statute has a more comprehensive reach by its clear terms than constitutional provisions of limited (Fourth Amendment) and uncertain (Fourteenth Amendment) application.

It is significant in the present connection that every expression in the books up to now is contrary to the holding of the court below.

In *Schwartz* v. *Texas*, 344 U. S. 199, while holding that telephone conversations intercepted by state officers were

admissible in a state prosecution, the Court was at pains to note (p. 201) that "the intercepted calls would be inadmissible in a federal court." And in *DeVasto* v. *Hoyt*, 101 F. Supp. 908 (S. D. N. Y.) a three-judge district court, though denying the plaintiffs—defendants in a state prosecution—an injunction against the use in that prosecution of telephone conversations intercepted by state officials, said (p. 909), "It is undisputed that this evidence would be inadmissible in a federal criminal prosecution."

III

The Government argues (Br. Op. 8-9), that since the interception in the present case was made by state officers under state law, the applicable rule is that of *Lustig* v. *United States*, 338 U. S. 74, 78-79, namely, that "a search is a search by a Federal officer if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

But the basis of the foregoing, see *Byars* v. *United States*, 273 U. S. 28, 33-34, was that the Fourth Amendment does not apply to state officers, at least until they are enforcing federal law. *Gambino* v. *United States*, 275 U. S. 310. But, as has been shown, §605 states categorically that "no person" shall intercept and divulge telephone communications, and this command accordingly governs prosecutions in federal courts. Indeed, *Rea* v. *United States*, 350 U. S. 214, where federal officers were enjoined from using evidence illegally obtained by them by becoming witnesses in a subsequent state prosecution, strongly suggests that the area for legal use of illegally obtained evidence is—very properly—becoming ever smaller.

IV

It is argued (Br. Op. 9, n. 1) that in the present case the federal officers did not knowingly offer evidence discovered as a result of the wiretap. But this assumes that the admissibility of the evidence in question depends on the *scienter* of those offering it. No such concept has validity here. Guilty knowledge is material in criminal cases, where punishment of the actor is in issue. Here, however, the question is not whether the federal officers are to be punished for having made use of the wiretaps, it is whether petitioner may invoke that fact to vitiate his own conviction. See *Irvine* v. *California,* 347 U. S. 128, 136-138. Consequently, it makes no difference that the federal officers did not know the source of the poisonous evidence that they used.

The analogy here is that of evidence tainted by perjury, and the controlling precedent comes from the last Term. *Mesarosh* v. *United States,* 352 U. S. 1.

There a conviction was set aside because evidence duly adduced at a trial, without knowledge of its falsehood, was later found to be untrue. This Court held that no conviction based on such tainted testimony could be permitted to stand.

Surely there can be no difference between a conviction tainted by untruthful testimony, not known to be such when offered by the Government, and a conviction tainted by testimony obtained by violation of §605, not known to have been such when offered by the Government.

The question is therefore not whether the Government knew of the taint when the evidence was first adduced, it is

rather whether the Government knows of the taint now. Plainly it does.

V

Nearly a generation ago, Mr. Justice Brandeis predicted (dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, 473) that—

> "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

The rule of *Olmstead*—that wiretapping is not a violation of the constitutional prohibition against unreasonable searches and seizures—still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States*, 316 U. S. 129, 136; *On Lee* v. *United States*, 343 U. S. 747, 758, 762. But the immediate problem now is whether, despite the categorical prohibitions of §605, a federal conviction may stand where it is shown to rest on wiretapped evidence obtained by state officers. We submit that, before a federal conviction obtained by federal ratification of "such dirty business" is sustained—Holmes, *J.*, *Olmstead* v. *United States*, 277 U. S. 438, 469, 470—review by this Court should be had.

VI

The court below said (Pet. App. 2a; 244 F. 2d at 390), "The case is important." Petitioner agrees, and accordingly reiterates his contention that this Court should grant the writ of certiorari in the present cause, to the end that enforcement of federal law in a federal court shall not rest on the fruits of a disobedience of federal law.

Respectfully submitted,

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